SUPREME COURT, U. S.
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No. 808

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

THE AMERICAN WATERWAYS OPERATORS, INC.,
Appellant,

v.

LOUISVILLE and NASHVILLE RAILROAD COMPANY and PENNSYLVANIA RAILROAD COMPANY, ET AL., *Appellees.*

On Appeal From the United States District Court for the Western District of Kentucky at Louisville

JURISDICTIONAL STATEMENT

A. ALVIS LAYNE
915 Pennsylvania Building
Washington, D. C. 20004

ROBERT L. WRIGHT
1000 Woodward Building
Washington, D. C. 20005

Attorneys for Appellant, The American Waterways Operators, Inc.

S. RUSSELL SMITH
500 Marion E. Taylor Building
Louisville, Kentucky 40202
Of Counsel

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the District Court is reported at 268 F. Supp. 71. The final opinion of the Interstate Commerce Commission is reported at 326 I.C.C. 77, and the preliminary opinion of a division of the Commission is reported at 323 I.C.C. 758. These opinions appear in full in the appendices to the Jurisdictional Statement filed herein by appellant, American Commercial Lines, Inc., *et al.* The appendix page references in this statement are to those appendices.

JURISDICTION

This suit was brought in the District Court under 28 U.S.C. 1336 and 2321-2323 to set aside an order of the Interstate Commerce Commission. The judgment of the District Court setting aside the order was entered on May 15, 1967, and notice of this appeal was filed in the District Court on July 12, 1967. The time for docketing this appeal in this Court was subsequently extended to and including November 9, 1967, by successive orders of the District Court and this Court. The following decision sustains the jurisdiction of this Court to review this judgment on direct appeal, pursuant to 28 U.S.C. 1253 and 2101(b); *American Trucking Associations, Inc.* v. *United States,* 364 U.S. 1.

STATUTE INVOLVED

Section 15a(3) of the Interstate Commerce Act (49 U.S.C. 15a(3)), as amended by the Transportation Act of 1958, 72 Stat. 572, and the statement of National Transportation Policy (49 U.S.C. preceding 1, 301, 901, and 1001), 54 Stat. 899. As so amended, section 15a(3) provides that minimum rates "shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act." That policy states that the Act shall be "so administered as to recognize and preserve the inherent advantages of each" mode of transportation.

QUESTION PRESENTED

The notice of appeal states three questions which may be summarized in the following single question as to the Commission's power to preserve intermodal competition:

When the Commission finds that a rail rate has been reduced on traffic "of far more consequence to the barges than to the railroads" to a point where "all of the traffic would move by rail" and thus threatens the ability of the barges "not only to compete, but to exist" (App. 57, 53, 57), and further finds by a comparison of fully distributed costs that the barges are the low-cost carrier; may the railroads justify the reduction on the ground that the reduced rate exceeds their out-of-pocket costs.

STATEMENT

Introduction

Appellant is an association of shallow draft water carriers, which intervened in this case because of the threat to efficient bargeline transportation posed by an argument made by the railroad appellees. The railroads urged the Commission to hold that no reduced rail rate could be suspended as destructive of intermodal transportation competition, so long as the reduced rate exceeded rail out-of-pocket costs. This argument was substantially modified during the proceedings in the District Court and its opinion embraces an argument not made to the Commission. A review of the proceedings before the Commission and the District Court makes this fact apparent.

The Proceedings Below

The appellee railroads reduced their rate for carrying ingot molds from Pittsburgh, Pennsylvania, to Steelton, Kentucky, from $11.86 to $5.11 per ton. The Commission suspended the redueed rate because (1) it would divert all of this traffic from bargelines to the railroads (App. 53), (2) the traffic was of a class deemed essential to continued bargeline competition

(App. 57), (3) a comparison of fully distributed costs showed the barge movement to be the low-cost movement (App. 52), and (4) the reduced rate was below those costs for both rail and barge movements (App. 53). The railroads defended the reduction before the Commission on the sole ground that the $5.11 rate earned a profit for them on their out-of-pocket costs. They did not argue to the Commission that, in order to determine which intermodal competitor was more efficient, a comparison of out-of-pocket costs should be made instead of the full cost comparison made by the Commission.[1] Instead of urging a comparison of out-of-pocket costs on the Commission, the railroads presented testimony of four economists who said that the only economically sound method of regulating rail rate reductions was to let the rails reduce any rate to a point where it would yield a profit on their out-of-pocket costs. If it yields such a profit, these experts said it could not be a destructive rate; ergo, cost comparisons, either out-of-pocket or fully distributed, were irrelevant. Railroad self-interest and the transportation market would then determine which modes of transportation should survive.

The Commission rejected this limited view of its regulatory function in both its preliminary and final decisions. It held that, as to regulated carriers, a comparison of their fully distributed costs should determine which mode of transportation was more efficient. The low-cost carrier would then be eligible to

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[1] The Commission decision notes:

> It is respondents' position that only out-of-pocket (incremental) costs of the proponent carrier should be considered, and that a rate which exceeds such costs is lawful. In their view no reliable intermodal cost comparison can be made and none should be attempted (App. 52).

receive Commission protection against a rate cut which threatened to deprive the more efficient mode of its inherent cost advantage. Although Division 2 of the Commission held that such protection had been waived when the bargeline quoted a rate slightly below its own fully distributed cost, the Commission at every stage of the proceding accepted fully distributed costs as the costs to be compared. This was the position maintained by the Solicitor General and the antitrust division of the Justice Department in *Interstate Commerce Commission* v. *New York, N. H. & H. R.R. Co.*, 372 U.S. 744, hereafter referred to as *New Haven*.[2]

In the District Court the antitrust division reversed its *New Haven* position and confessed error on the Commission. The division was apparently persuaded by the railroads' argument that the 1958 amendment to the Interstate Commerce Act was intended to substitute free market competition for Commission regulation as a means of insuring the survival of efficient intermodal transportation competition. The antitrust division argued in the District Court, however, that the Commission had authority to insure the survival of intermodal competition by suspending a rail rate-cut, providing that a comparison of out-of-pocket costs showed that the competing mode, whose traffic was being pre-

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[2] The Summary of Argument in the brief for the United States in *New Haven* said at p. 15:

> To warrant protective action it must be shown not only that the competing carrier possesses an inherent cost advantage, but also that this advantage would be impaired by the proponents' rate. Such impairment occurs, we submit, when the low-cost carrier is unable to fix a rate which (a) covers its fully distributed costs and (b) affords it a rate advantage (as against the high-cost carrier) which is no less than the cost differential (measured in terms of fully distributed costs) between the two modes.

empted by the cut, had the lower out-of-pocket costs in carrying it.[3] In the District Court an issue not before the Commission was thus joined as to whether a full cost or out-of-pocket cost comparison should be used to determine the more efficient mode.

The District Court's Decision

The District Court's opinion unequivocally holds that the Commission's decision violates the law and has no rational basis. The Court's judgment permanently enjoins enforcement of the Commission's order. The Court apparently interpreted the statute in a way which does not leave the Commission free to sustain its order by clarifying or supplementing its findings. While complaining that the Commission failed to support its conclusion that fully distributed costs should be compared, the Court fails to note that the Commission was not asked to use any other comparison to determine the low-cost mode. Had an argument in favor of an out-of-pocket cost comparison been presented to it, the Commission might have found that such a comparison with rail carriers would generally exclude from the low-cost designation the more efficient, specialized carriers, such as bargelines, whose fully distributed and out-of-pocket costs on the limited classes of traffic they carry are virtually the same. The Commission might also have countered such an argument by pointing out that a railroad may destroy a competing mode by cutting rates on such limited classes of traffic to a point just above out-of-pocket costs and relying upon higher rates prevailing on its other traffic to cover

[3] The Reply Brief for the United States submitted to the District Court in this case asserts that ". . . the mode which has the lowest intermediate-long range out-of-pocket cost for a particular service is the most efficient mode to provide that service" (pp. 5-6).

the full cost of operating a railroad. The court's opinion, therefore, seems to hold that, in the circumstances of this case, the Commission is barred from using a full cost comparison, as a matter of law.

The Court below also erroneously assumed that the Commission was trying "to prevent any rate competition which threatens the existence of a competitor" (App. 14). The Commission did find that the rate-cut in question threatened the continued existence of barges as railroad competitors (App. 57, 60). But the Commission also showed by a detailed comparison of fully distributed costs that the barges were the lower cost mode and that the rail rate was cut below the full costs of the railroad as well as below the full costs of the barges. The Court's assumption that the purpose of the Commission's suspension was not to "prevent destructive competition" (App. 11) mistakenly assumes that elimination of a more efficient competing mode by below cost rate cutting is not destructive competition.

The Court below announced the proposition that "compensatory rates should normally be allowed" (App. 20) without any discussion of the precise costs that should be allowed to enter the computation of a compensatory rate. It rejects established Commission formulae for determining compensatory rates and holds that any rail rate exceeding "relevant out-of-pocket costs" (App. 20) should be regarded as compensatory in determining the low-cost mode. The Court's decision is thus a flat refusal to permit the Commission to discharge its statutory duty to preserve intermodal competition by suspending a rail rate which undercuts both fully compensatory rail costs and the costs actually incurred by barges in hauling more efficiently the traffic that the cut rate preempts for the railroads.

THE QUESTION INVOLVED IS SUBSTANTIAL

This appeal raises the fundamental question of what facts the Commission must find to justify suspension of a rail rate which threatens to eliminate the competition of a more efficient mode of transport. It seems beyond dispute that the 1958 amendment was intended to give the railroads more flexibility in meeting intermodal competition while retaining in the Commission the power to suspend rail rates which threaten to destroy more efficient competitors. In *New Haven,* this Court exhaustively considered that amendment and affirmed the Commission's continuing duty to deal with this problem in a flexible fashion, without supplying explicit guidelines. The District Court has now decided that the factors normally relied upon by the Commission to justify suspension of a rail rate that threatens to destroy intermodal competition are irrational considerations, unsupported by the Act it administers. The Commission is told only that compensatory rates should normally be allowed without any explanation of why the circumstances found by the Commission here did not justify the suspension ordered.

If the facts found by the Commission here, to wit, lower full costs of barges and threatened destruction of the barges as competitors for the traffic, do not justify suspension of a rail rate cut below both the rails' and the barges' full costs, what facts would justify suspension of a rail rate to preserve intermodal competition?

New Haven appeared to give the Commission a range of discretion in dealing with this problem that the District Court now says the Commission does not have. Unless this Court reaffirms its *New Haven* decision that the Commission, not the courts, must select the cost comparisons needed to preserve efficient intermodal competition, the Commission is helpless to dis-

charge its obligation to prevent destruction of such competition by railroad rate cuts.

CONCLUSION

This Court should review and reverse the District Court's decision. The question raised is important and an authoritative answer is needed by the railroads, the bargelines, and every transportation company subject to Commission jurisdiction.

It is, of course, unfortunate that the Commission was given no opportunity to consider the out-of-pocket cost comparison argument ultimately presented to the District Court. If this Court concludes that plenary consideration should be deferred until the Commission has had an opportunity to address its findings specifically to the relative merits of fully distributed and out-of-pocket cost comparisons in cases such as this one, the decision below should be summarily vacated and the case remanded to the Commission for performance of this task.

Respectfully submitted,

A. ALVIS LAYNE
915 Pennsylvania Building
Washington, D. C. 20004

ROBERT L. WRIGHT
1000 Woodward Building
Washington, D. C. 20005

Attorneys for Appellant, The American Waterways Operators, Inc.

S. RUSSELL SMITH
500 Marion E. Taylor Building
Louisville, Kentucky 40202
Of Counsel

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